Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-353

In The

Supreme Court of the United States

October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

A Colorado statute mandates the at-large election of three county commissioners in most Colorado counties, including Saguache. Local officials have no authority or discretion to change the system. The petitioners did not attack the statute itself, but only its application in and to Saguache County. In a bench trial there was disputed testimony, from experts and lay witnesses, as to whether Hispanics in that county were politically cohesive, whether there was racial bloc voting, and whether the Anglo majority voted sufficiently in a bloc to enable it usually to defeat the preferred candidate of the Hispanic minority. The trial court found in favor of the respondents, on the facts and on the law, and the Tenth Circuit affirmed. The respondents believe that the following questions are appropriate:

1. If the state-mandated system is a proscribed electoral device under the Voting Rights Act of 1965, as amended, was it adopted or maintained by local officials?

2. Based on the quantity and quality of the evidence presented, were the findings of fact by the District Court clearly erroneous?

3. Did the trial court and the Court of Appeals correctly apply the federal law and the Supreme Court interpretations thereof?

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Title 28, U.S.C. § 2403(b) may be applicable. The United States District Court for the District of Colorado certified to the Attorney General of Colorado the fact that the constitutionality of the state statute had been drawn into question. The Attorney General declined to participate in the trial of this cause.

SUPPLEMENTAL STATEMENT OF THE CASE[1]

A Colorado statute [Appendix A] in effect for many years, requires the at-large election of three county commissioners in most Colorado counties, including Saguache. County commissioners are authorized and required to define the boundaries of the three residency districts, but the voters of the entire county vote for the candidates for county commissioner. Local officials have no right, authority or discretion to alter or disregard the mandate of the statute.

The petitioners disavowed any claim that the current residency districts, if used in a single district election, would produce any different election results; therefore, a redistricting would be necessary to accomplish their goals (324-325). Such redistricting would probably have to disregard established precinct boundaries (349-350).

Dr. Brischetto, petitioners' expert, claimed Hispanics and Anglos vote differently and that it made no difference that the elections were partisan (298). His opinion

[1] Parenthetical references are to page numbers of the Trial Transcript, Appendix B.

was that the present at-large system does not give Mexican Americans an equal opportunity to elect candidates of their choice (359). He analyzed 10 races in which there was an Hispanic candidate (366). He identified the race of each candidate by surname, and *assumed* that only Hispanics would represent the interest of the Hispanic community (366-367, 391, 400) even though he agreed that a candidate must be publicly known or publicly regarded as one associated with the minority for the results to be valid (431-432). He could have done an analysis of the Democratic v. Republican vote with the information he had, but he did not do so (372-373). The witness agreed that if the Hispanic number of votes cast (the turnout rate) remained constant year after year, without regard to the ethnicity of the candidates, that would tend to show that voting is not related to the race of the candidate (395-396).

Dr. Ellis, respondents' expert, was wary of the small samples with which to work in Saguache County (486-487); therefore, he performed a variety of analyses and used those variables which were most statistically significant and that were consistently able to explain the voting patterns in the county (488-489). One of the problems was that four of the nine precincts had only a total of 23 registered Hispanic voters (494). He performed six different analyses on each of 15 political contests (a total of 90 tests) (489). Eight of the political races he examined were for the office of county commissioner, the others were state or local races (491).

Dr. Ellis testified that, in his opinion, any polarized voting is along political party lines, not racial lines (528-529) and, because he also considered contests in

which only Anglos were candidates, he found that Hispanics vote for Anglo Democrats to the same extent that they vote for Hispanic Democrats (529-532, 545). He found no indication that Anglos alter their voting behavior when an Hispanic is a candidate and that Anglos do not withhold or shift their votes to defeat or frustrate Hispanic efforts (534-535). In fact, he found that in all cases analyzed there was a significant white crossover vote in favor of Hispanic candidates (535, 537). The voter turnout rate by Hispanics is the same, whether or not an Hispanic is a candidate (538).

ARGUMENT

I. THE COLORADO STATUTE WHICH MANDATES THE AT-LARGE ELECTION OF COUNTY COMMISSIONERS IS NOT A PROSCRIBED ELECTORAL DEVICE AND WAS NOT ADOPTED OR MAINTAINED BY THE RESPONDENTS.

Title 42 U.S.C. § 1973, the federal statute upon which the petitioners based their claims, prohibits the use of a "standard, practice, or procedure" in any State or political subdivision which results in a denial or abridgment of the right to vote on account of race or color. A violation of that provision is established if it is shown that the political processes in the State or political subdivision are not equally open to a particular class in that its members have less opportunity than others to participate in the political process *and* to elect representatives of their choice.

The Colorado statute [Appendix A] which is claimed to be a prohibited "standard, practice, or procedure" applies to almost all Colorado counties, including Saguache. The county commissioners are required to create three compact districts, of roughly equal population, and these are "residency districts" from which candidates for the commissioner seats are elected. *Board of County Commissioners v. Edwards*, 468 P.2d 857 (Colo. 1979). Notwithstanding the required residency in a particular district, the elections are at-large. All eligible voters in the county may vote for candidates from any residency district.

No local official or group of officials has the right, authority, or discretion to change this state-mandated system. In Colorado, as in most other jurisdictions, local officers act as mere instrumentalities of the state government for the accomplishment of the purposes of the statute, and it is not proper for them to raise or consider the question of the constitutionality of the statute under which they act. *Board of County Commissioners v. Fifty-First General Assembly*, 599 P.2d 887 (Colo. 1979).

The petitioners do not challenge the validity of the state statute itself, admitting that it is facially neutral. They claim, however, that the application of the statute in and to Saguache County violates the federal statute. There is no doubt that the statute is applied in Saguache County in exactly the manner prescribed and required, and in exactly the same manner in which it is applied in the other Colorado counties where it is applicable. In such circumstances it would be inappropriate for the federal courts to hold that this state mandate was

adopted, maintained or enforced by a political subdivision of the state.

The situation is analogous to rulings in cases brought under 42 U.S.C. § 1983. That is, municipal liability attaches only where the decision-maker is responsible for establishing final government policy respecting such activity. Whether an official has final policymaking authority is a question of state law. Municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986); *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427, 471 U.S. 808 (1985); *Lowe v. City of St. Louis*, 843 F.2d 1158 (8th Cir. 1988); *Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987).

The respondents in this case do not include the State of Colorado or any of its officers who are responsible for the execution and enforcement of state election laws. The federal statute prohibits certain electoral devices in a state or political subdivision, but nothing in the language of the law suggests that a county and its officers, who did not create and do not maintain the challenged state statute, are responsible for a violation of federal law. A fair reading of the federal statute in question here clearly requires that the challenge of a state law is to be brought against the state and its officials, and that officers of the political subdivisions should be required to respond only to challenges to locally adopted or maintained electoral devices.

II. THE FINDINGS OF FACT BY THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS AND SHOULD NOT BE DISTURBED ON REVIEW.

Rule 52(a), Fed. Rules Civ. Proc., applies to cases under 42 U.S.C. § 1973. *Thornburg v. Gingles*, 106 S. Ct. 2752, 2781, 478 U.S. 30, 79, 92 L.Ed.2d 25 (1986). It was held in *Gutierrez v. Denver Post, Inc.*, 691 F.2d 945, 946 (10th Cir. 1982):

> The trial court's findings are presumptively correct and the appellate court cannot disturb them unless they are clearly erroneous. [citations omitted]. In order to conclude that the trial court's findings are clearly erroneous we must be "left with the definite and firm conviction that a mistake has been committed."

When a matter is tried to the court, the appellate court must view the evidence in the light most favorable to the prevailing party and give it the benefit of all inferences that may reasonably be drawn therefrom. *Amoco Production Co. v. Western Slope Gas Co.*, 754 F.2d 303, 309 (10th Cir. 1985); *Mullan v. Ouickie Aircraft Corporation*, 797 F.2d 845, 850 (10th Cir., 1986); *Anderson v. Bessemer City*, 470 U.S. 564, 573-575, 105 S. Ct. 1504, 84 L. Ed.2d 518 (1985).

The evidence in this case showed the existence of a fact not present in any reported decision involving § 1973, either before or after *Thornburg v. Gingles*, supra. That fact is that one faction of the protected minority in this case [including some or all of the petitioners] had absolute control of the Democratic Party in Saguache County, Colorado. Without the consent and assistance of

Hispanics, no person, Anglo or Hispanic, could be nominated at the Democratic county assembly or could win the Democratic primary election.

The trial court's bench opinion was amply supported by the testimony and exhibits presented and the petitioners should not be heard to complain that there was evidence from which the trial judge could have reached a contrary conclusion (although that is not conceded by the respondents).

The trial court found that what was involved was a state statute which required at-large voting, and that historical discrimination did not hamper or affect the political effectiveness of Hispanics in Saguache County. The trial court specifically mentioned that one problem with the work of petitioners' expert was that he *assumed* that only Hispanics were the choice of Hispanics. The court agreed with the methodology of petitioners' expert, but also gave weight to the analysis of respondents' expert. The court said it was clear without any statistics that political parties played a strong role in the results. The sum of the evidence was sufficient to convince the court that certain named Anglos, over the years, *were* the representatives of the Hispanic population.

The trial court found, *as a fact*, that Hispanics either controlled the Democratic party or had great influence in deciding who could be a candidate. Apparently because of that finding, the trial court found it was relevant to consider the electoral success of unopposed Hispanics. It was also found that certain Anglo candidates were successful only because they had Hispanic support. The closeness of the final results in a number of elections

convinced the court that Hispanics had and exercised substantial political influence in the county.

The trial court had no difficulty in finding that the Hispanics did *not* constitute a single cohesive group, and under the present system they could in fact elect one or more Hispanic commissioners in Saguache County. The petitioners failed to establish to the satisfaction of the trial court that Hispanics had less opportunity than others to participate in the electoral process or that the white majority usually voted as a bloc to defeat minority-preferred candidates. The court did find that the white majority usually voted for the Republican candidates, but that the unaffiliated group consisting of 32 percent of the voters (including a substantial number of Hispanics) was the swing vote which determined the outcome of the elections. [The ability to "swing" the outcome of an election is a significant form of political access. *Seamon v. Upham*, 536 F. Supp. 931 at 948 (E.D. Tex. 1982).] Whether the system used had the effect of diluting the minority vote is a question of fact, not law. *Thornburg*, 106 S. Ct. 2781, citing *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272 at 3278-3281 (1982) and *City of Rome v. United States*, 446 U.S. 156 at 183, 100 S. Ct. 1548 at 1565 (1980). In *Thornburg*, the Supreme Court adhered to its previous rulings that the ultimate finding of vote dilution is a question of fact subject to the clearly erroneous standard of Rule 52(a). Quoting from its decision in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), the court said:

> We are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . multimember district in light

> of past and present reality, political and otherwise [citations omitted].

Each and every finding of the trial court was justified and supported by substantial evidence in the record and the judgment, based on those findings, should not be disturbed on review.

III. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED THE FEDERAL LAW AND THE SUPREME COURT INTERPRETATIONS THEREOF.

Title 42 U.S.C. § 1973, as interpreted by the Supreme Court in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), contains the criteria by which the case for the plaintiffs was to be won or lost. There are three limitations on the ways in which a violation may be proved. *First*, electoral devices, such as at-large elections, are not per se violations; plaintiffs must prove that, under the totality of the circumstances, the challenged device results in unequal access to the electoral process. *Second*, the combination of the challenged electoral device and the lack of proportional representation does not establish a violation. *Third*, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Thornburg*, 106 S. Ct. at 2764. The trial court clearly found that Hispanics have equal access to the electoral process; that, because Anglos regularly were the representatives of Hispanic voters, there was not a lack of proportional representation; and that the petitioners had failed to establish the existence of racial (as opposed to political) bloc voting.

As to the three tests to determine whether there exists racial bloc voting (*Thornburg*, 106 S. Ct. at 2766-67),

the trial court did find that the Hispanics in Saguache County were in a group that was large and "could be geographically compact". However, the court found no proof that at-large voting using the present residency districts would result in an unfair vote. The trial court also concluded that the petitioners had failed to prove that the Hispanics, as a group, are politically cohesive or that the Anglos vote as a bloc to defeat the minority's preferred candidate.

Contrary to the assertions of the petitioners, the trial court did not accept any explanation of racially polarized voting. Instead, the court found that the evidence did not prove the existence of racially polarized voting. In Saguache County, party affiliation is, in and of itself, a major factor in the election results and does not result in, or result from, racial polarization. The evidence simply did not convince the trial court that racial bloc voting in fact existed.

The trial court was not obligated to accept the view or conclusions of one expert over those of another. Indeed the court was at liberty to disregard any statistical analysis. "[T]here is no simple doctrinal test for existence of legally significant bloc voting." *Thornburg*, 106 S. Ct. at 2770.

In *Davis v. Bandemer*, 106 S. Ct. 2797 at 2801-2802, 478 U.S. 109, 92 L. Ed.2d 85 (1986), decided on the same day as *Thornburg*, the court recognized the right of the trial court to disregard conflicting statistical evidence if it did not "wish to choose which statistician is more credible or less credible." Although that case dealt with a statewide reapportionment plan, the concept that the mere lack of

proportional representation will not be sufficient to prove unconstitutional discrimination applies to individual districts. 106 S. Ct. at 2810. There the court noted that it could not presume that those who are elected will disregard the disproportionately underrepresented group, and that there is no unconstitutional discrimination unless the system is such that it will consistently degrade a voter's influence on the political process as a whole. In this case, the trial court found on substantial supporting evidence that the minority group exerted a strong degree of influence on the electoral process. Indeed, because Hispanics *controlled* a major political party, no other conclusion was possible.

The Voting Rights Act neither entitles a minority group to be included in a single voting district nor requires the electoral segregation of any segment of the majority population whose views conflict sharply with those of the minority. *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 747 (D.C. Mass. 1985). Even where an at-large system interacts with a racially or ethnically polarized electorate to the disadvantage of the minority, the result is not necessarily a denial of political access. *Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir. 1984), citing *Whitcomb v. Chavis*, 403 U.S. 124 at 156-60, 91 S. Ct. 1858 at 1875-77 (1971).

The burden of proof was always upon the petitioners to show that the system complained of constituted a violation of the federal law and, in this case, they have failed to do so. The adverse judgment suffered by the petitioners was not the result of the trial court's failure to apply the proper standards; it resulted from the failure of

the evidence to convince the trier of fact that the petitioners should prevail.

CONCLUSION

The respondents did not adopt and they do not maintain the requirement that county commissioners be elected from the county at-large. Local officials have no authority or discretion to disregard the state-mandated requirements for election; therefore, any action concerning the validity of such requirements should be brought against the State or the appropriate state officials.

In this case there was substantial evidence in the record to justify and support the findings of fact by the trial court. The trial court was free to accept the testimony and conclusions of one expert over those of another, or to reject the conclusions of both, and the credibility of each witness was a matter for the trial court to determine. The trial court determined that the at-large system did not adversely affect the opportunity of the petitioners to fully participate in the electoral process and to elect representatives of their choice. The long-term control of a major political party by the protected minority negated most claims of the petitioners and was further justification for the trial court's finding that the minority had, in fact, elected representatives of their choice.

The trial court neither misunderstood nor misapplied the legal tests for determining any violation of the federal statute. The facts, as found and determined by the trial court, lead to the inescapable conclusion that the petitioners failed to prove their case. The judgments of the

trial court and the Court of Appeals were eminently correct, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COLORADO REVISED STATUTES

30-10-306. Commissioners' districts – vacancies. (1) Each county shall be divided into three compact districts by the board of county commissioners. Each district shall be as nearly equal in population as possible, shall be numbered consecutively, and shall not be subject to alteration more often than once every two years. One commissioner shall be elected from each of such districts by the voters of the whole county. If any commissioner, during his term of office, moves from the district in which he resided when elected, his office shall thereupon become vacant. All proceedings by the board of county commissioners in formation of such districts not inconsistent with this section are confirmed and validated.

(2) Each county having a population of seventy thousand or more which has chosen to increase the members of the board of county commissioners from three to five shall be divided into three or five districts by the board of county commissioners according to the method of election described in section 30-10-306.5 (5) or (6). The districts shall be as nearly equal in population as possible, shall be numbered consecutively, and shall not be subject to alteration more often than once every two years. Commissioners shall be elected at large or from districts according to the method of election described in section 30-10-306.5 (5) or (6). If any commissioner required to be resident in a district moves during his term of office from the district in which he resided when elected, his office shall thereupon become vacant. All proceedings by the board of county commissioners in

formation of such districts not inconsistent with this section are confirmed and validated.

(3) When a board of county commissioners determines to change the boundaries of commissioner districts or when new districts are created, such changes or additions shall be made only in odd-numbered years and if made shall be completed by September 30 of such year, except in cases of changes resulting from changes in county boundaries.

(4) Notwithstanding subsections (1) to (3) of this section, after each federal census of the United States, each district shall be established, revised, or altered to assure that such districts shall be as nearly equal in population as possible based on such census in the following odd-numbered year and shall be completed by September 30 of such year.

APPENDIX B

PARTIAL TRIAL TRANSCRIPT

* * * (p. 297)

similar information within this exhibit; that is, the page listing the data that was used and then the graph with the figures at the bottom?

A. Yes, that's correct.

Q. Now, what conclusion can you reach from the analysis that you've conducted?

A. Well, I think it's – what I found is very clear and consistent pattern of racially polarized voting between Anglo and Hispanic voters in Saguache County. And I found this over a period of 1976 to 1986, and the polarization was found in all cases except one; and in that one case, where we had two Hispanic candidates running against one Anglo candidate, I could not say that we found highly polarized voting.

Q. In that one race?

A. That's right.

Q. Now, the Judge asked you some questions about party affiliation and the impact on your analysis. Does the fact that elections were partisan affect your conclusion?

A. No. I mean I analyzed Democratic primaries as well as general elections; and I found the same patterns in both..

THE COURT: Well, except for one. That was the primary.

THE WITNESS: That's right. Except for one of the three primaries that I analyzed. I'm saying my general conclusion, though, is that in the primaries, in – I could only (p. 298)
find three primaries where there were actual head-to-head contests between Anglos and Hispanics; and so I made a – I analyzed those; and in one of the three, we had – did not find severely polarized voting. It certainly was – there was a difference in the support for the Hispanic candidate by Hispanic voters and non Hispanic voters, a difference, if you combine the Hispanic candidates – you found that they combined about half of the Anglo vote; but the difference – the fact that they did receive that much of the Anglo vote, I would not call that race, then, severely polarized. And so in one of the cases, it was not severely polarized.

BY MR. GARZA:

Q. Dr. Brischetto, would it be fair to conclude that Mexican Americans and Anglos are voting different, from this analysis?

A. Well, very clearly.

Q. And does that – is that impacted in any way by the fact that elections are partisan?

A. No. I mean the conclusion is the same whether you look at partisan or nonpartisan races.

Q. Does this analysis – or what does this analysis tell us about minority voter political cohesion?

A. Well, it tells us that certainly Anglos are voting as a bloc and Hispanics are voting as a bloc, and they're

voting differently. And so there is political cohesiveness in both the communities.

(p. 299)

Q. All right. Now, if you would look, please, at Plantiff's Exhibit No. 8 –

THE COURT: Maybe this would be a good time to take a break before we start with 8.

MR. GARZA: Sure.

THE COURT: We're about ready for an afternoon break. Let's take a 15-minute recess.

(The Court was in recess from 3:40 till 4:10 p.m., and when reconvened, the following proceedings were had and entered of record:)

THE COURT: You understand you're still under oath in this case?

THE WITNESS: I do.

BY MR. GARZA:

Q. Dr. Brischetto, instead of Plantiff's Exhibit 8, let me refer you first to Plantiff's Exhibit No. 15 and ask if you would please describe that for the Court.

A. Plantiff's Exhibit 15 is a socioeconomic profile of Saguache County.

Q. What does that mean?

A. That takes various indicators of social stratification in the community, social and economic indicators, and analyzes them with regard to both the Hispanic community and non Hispanic community, the extent to which

the two groups are stratified and – stratified in regard to these various factors,

* * * (p. 323)

by the defendants or the plaintiffs. It's simply premature.

MR. GARZA: Your Honor, Plaintiffs do not attempt to submit Plantiff's Exhibit No. 6 and 7, which are the single member district plan, as a suggested remedy; but rather we submit Plantiff's Exhibits 6 and 7 in order to demonstrate that it is possible to draw a single member district plan in which Mexican Americans, or the minority population of Saguache County, is a majority of a particular district, as is our burden under *Gingles*.

THE COURT: Now, let me just understand, because it was not at all my understanding that you were asking for redistricting in this lawsuit. You were asking for the Court to rule on the at-large provision.

MR. GARZA: Your Honor, as a remedy, we would be asking the Court adopt a single member district election plan, which is the traditional remedy when at-large election plans are found to dilute minority voting strength.

THE COURT: But it goes to what the districts in reality are today, not with redrawing districts. If you're asking for redrawing of districts, then you need a three-judge court. We talked about that before.

MR. GARZA: No, your Honor. We're asking that the at-large election system be outlawed in Saguache County under section 2 of the Voting Rights Act.

THE COURT: That's what you were asking for.

(p. 324)

MR. GARZA: And the courts have consistently said that a remedy for such a violation is the implementation of a single member district plan. And Mr. Lubow is right; That should be considered at a remedy hearing post determination of liability. Plantiff's Exhibit No. 6 is not being submitted to the Court with the intent of offering a remedy at this stage. Rather, we are offering it to meet our burden under *Gingles*, which says we must demonstrate that it is possible to draw a single member district in which the minority community is a majority of that district.

THE COURT: You do not intend to show in this lawsuit that one of the three existing districts, if the at-large provision were eliminated in Saguache County, would result in different results?

MR. GARZA: I don't think that it does, your Honor; and we do not intend to show that, no.

THE COURT: Okay. I'm afraid I'm a little bit at a loss in trying to understand what you're asking for, because I did not understand that you were asking for a redistricting of Saguache County. Are you?

MR. GARZA: Yes, Judge.

THE COURT: Not in this lawsuit, though.

MR. GARZA: Yes, Judge, in this lawsuit. It – in our complaint, in our request for relief, we specifically asked that a single member district plan which is fairly drawn and (p. 325)
complies with Federal law be adopted by this court as a

remedy, as remedy to the violation of section 2, which the at-large election system is.

THE COURT: Could you refer me to your complaint where you ask for that, please.

MR. GARZA: Certainly, your Honor. At page 5 of plaintiffs' amended complaint under prayer for releif at paragraph D: "order into effect a single member district plan for the election of members of the Saguache County Commission which provides Plaintiffs with a remedy for violation of their rights as described above"; and paragraph E, "to redistrict the present county commissioner seats."

THE COURT: It wasn't in your original complaint.

MR. GARZA: I believe it was, your Honor.

THE COURT: It was?

MR. GARZA: At page 4 of Plaintiffs' original complaint under prayer for relief paragraph C: "order into effect a plan for the election of members of Saguache County Commission which provides Plaintiffs and those similarly situated with a remedy for the violation of their rights as described above"; and paragraph D, "to redistrict the present county commissioner seats."

THE COURT: All right. I thought when I reviewed the complaints and reviewed the pretrial order – I thought we were pretty well talking about the statute, but you are asking for

* * * (p. 349)

THE COURT: 1973 2(b)? Do you have the statute with you, Chris?

MR. LUBOW: I have it.

THE COURT: Well, I'm sure he can get it.

I think we have a more – I have a question that I'd like to hear answered before I admit this exhibit; and that is are the lines on 7 drawn along precinct lines.

THE WITNESS: No, your Honor, they are not. And may I explain why?

THE COURT: No, let me just ask you a question.

THE WITNESS: All right.

THE COURT: Dr. Brischetto, if the plaintiffs in this case are asking that the voting not be at large; that it be by district, then how on earth are you going to have a district vote unless the lines are along precinct lines.

THE WITNESS: Your Honor, it's not necessary to maintain precinct boundaries in drawing the best plan. In fact, it may that can you – one would have to reconstitute the voting precincts in order to give a fair chance of minorities electing a candidate of their choice or a district that would allow them an equal chance of electing a candidate of their choice.

THE COURT: So your plan contemplates redrawing precinct lines, also.

THE WITNESS: It may require that, your Honor, yes.

THE COURT: What do you mean "may"? You can't have (p. 350)
people coming into a precinct –

THE WITNESS: No, it would.

THE COURT: – for two different districts in the precinct.

THE WITNESS: It would require that under our plan.

THE COURT: Did you try to look at the situation based on the existing precinct lines?

THE WITNESS: Well, no, I did not – I was not provided those data, and I did not have population data by precinct lines.

THE COURT: I know you don't have population, but you do have apparently the – didn't we have information by precinct in one of these exhibits? I'm trying to remember which one.

THE WITNESS: I did have information on registered voters by precinct. And I had counts of Spanish surnames among those registered voters that I did for the year 1984. However, the way I understand that these plans are to be drawn is the basis – I've always been, in following the instructions of the courts and so forth – I've been asked to draw these according to 1980 population data, rather than on the basis of registration data. And so that's what what I used. I used 1980 census data; and with 1980 census data, I was able to come up with a – with – MALDEF was able to, in working on these data, come up with a plan that would provide the – with the use of enumeration district lines a – a plan which I would consider both compact and contiguous and which would have a large concentration of

* * * (p. 359)

THE COURT: Okay. Go ahead.

MR. GARZA: Thank you, your Honor.

BY MR. GARZA:

Q. Dr. Brischetto, considering all the analysis that you've done and all the records that you've reviewed, all the articles that you've reviewed, all the testimony that you've heard, do you have an opinion as to whether the current at-large election system for Saguache County – or what is your opinon as to the impact of the currently at-large election system for Saguache County commissioners on minority voter participation?

A. I think the present at-large system in Saguache County does not give Mexican Americans an equal opportunity at the polling place in electing candidates of their choice and denies them equal opportunity.

Q. As you have defined voter dilution, does the current election system dilute minority voting strength in Saguache County?

A. I think it very clearly does.

MR. GARZA: Pass the witness, your Honor.

THE COURT: Before we hear cross-examination, when you say candidates of their choice, are you talking about only county-wide candidates, or are you talking about local candidates?

THE WITNESS: I'm talking about in the county elections.

* * * (p. 366)

Q. You said at the beginning of your testimony you had a correlation or you had done correlation regression analysis to determine the proportion of votes for Hispanics related to the voters who are Hispanic. Did I get that correct?

A. That's correct, related to the proportion of voters in a precinct that are Hispanic, yes.

Q. And is that why in your analysis, you analyzed 10 races in which there was at least one Hispanic candidate?

A. That's right.

Q. But you didn't analyze any races in which there was no Hispanic candidate?

A. That's correct, in the exhibit that I presented. That's correct.

Q. How did you determine that none of the races in which there were only Anglos running involved a candidate desired by some or many or all of the Hispanics in the county?

A. Well, actually, since I didn't have prior information as to which of the Anglo candidates might be the choice or – of the Hispanic community and represent their interests, I chose to identify candidates by surname; and the assumption that I was making was – I think it's a reasonable one – that those candidates that are Hispanic would be most likely to be seen by the Hispanic community as representing their interests. Now, that's not always true; and indeed, there may be some Anglo candidates that would represent their interests, even –

(p. 367)

Q. For your work in this case, you assume that nobody with an Anglo name was representing the interests of the Hispanics?

A. I had no information that would lead me to conclude that.

Q. Was my statement right: that you made that assumption for your work in this case?

A. Would you repeat it, please.

Q. For your work in this case, is it true that you assumed that no candidate with an Anglo name represented Hispanic interests?

A. That is why – without any information as to whether or not a candidate, an Anglo candidate had – did represent Hispanic interests, I did make that assumption, yes.

Q. All right. You also knew or assumed that the great majority of Hispanics in that county were affiliated with the Democratic party?

A. No, I didn't make that assumption.

Q. You didn't have information to that effect?

A. Oh, I did have some information about the party identification of Hispanic registered voters.

Q. And didn't that show that the majority of Hispanics were registered, if they were registered – were registered as Democrats?

A. Yes, it showed that about three-fourths of Hispanics that were registered in 1984 in Saguache County were registered as Democrats.

* * * (p. 371)

particular precinct, nowing how many are registered Anglos and knowing how many were registered Hispanics, how do you know how many of those registered Anglos voted for the Anglo candidate and how many voted for the Hispanic candidate?

A. If you'd like me to go through the procedure, I'd be glad to describe how I did my – how I did my estimates.

Q. You can't tell me in a few words the general method of how you know?

A. Yes. What we do is we look at the pattern in the relationship between the ethnic composition of the precinct – that is, the percent Hispanic of voters in the precinct – and the percent or – of votes received by the Hispanic candidate. After plotting each precinct according to that – those two variables, we then look for a pattern in the data; and if there is a straight line pattern, it would show up in the regression analysis as a high correlation.

Q. Let me stop you for a moment. I don't know whether you made a statement in error or not. You talked about the Hispanic candidate and the Hispanic votes that he got. Did you mean Hispanic votes or total votes?

A. No, I meant the total votes received by the Hispanic candidate. Thank you. But what we're doing ultimately after looking is predicting the votes – percentage of votes received by the Hispanic candidates from knowing the ethnic composition of the precinct. We can then through drawing the regression (p. 372)

line, which is a description of the average pattern of the

precincts – we can look at what that vote is at – where the percent Hispanic for a precinct is zero, and our prediction would then give us the Anglo vote. That would be Anglo equals 100 percent. That would give us the Anglo vote, the estimate of the Anglo vote for the Hispanic candidate. And at that point at which the ethnic composition, where the regression line crosses at Hispanic percent equals 100, that would give us the Hispanic – our prediction of the Hispanic vote for the Hispanic candidate.

And those estimates are derived, then, from our regression analysis. And those estimates gave me the ones that I presented in the summary table there of the Anglo and the Hispanic votes for the Hispanic candidates.

Q. Well, isn't it also true that if a particular precinct, the number of registered Republicans is zero, then the number of votes that a candidate got from Democrats would be a hundred percent; and the more Republicans you then get in, into that precinct, then the candidates' votes will drop when you consider how many Democratic votes he got? Isn't that right? Isn't that the same thing, only I've substituted Democrat and Republican instead of your statements of Hispanic and Anglo?

A. If you're asking me wouldn't I be able to do the same analysis on – in predicting the Democratic and Republican vote, yes, that could be done, also.

(p. 373)

Q. Did you do that in this case?

A. I – actually, I did not in these exhibits. I was looking over the – I'm trying to remember what analysis I did on

Mr. Ellis' – Dr. Ellis' report; and as I recall, I was also looking at the correlations that he ran on Democrat – percent Democrat.

Q. I'm sorry. My question was in the 10 races you analyzed as far as Hispanic and Anglo, did you also in those same 10 races analyze Democrat vs. Republican?

A. Those 10? I believe I did for some of them.

Q. But they're not included in the documents that are –

A. No, I was interested in the polarization question – not polarization along Democrat or Republican lines.

Q. You said that in each of the cases you analyzed, you weighted the votes. The votes, if I – let me see how close I am to your statement. The votes were weighted to give equal weight to each voter by how many votes he represents. Is that about right?

A. No. The precincts were weighted according to the number of votes that that precinct represents.

Q. Give me an example, if you will, please?

A. For example, in 1986 in the general election, let's take the election in the Democratic primary. In precinct No. 2, the total votes cast was actually six votes – seven votes, in one precinct. That's in Precinct 2. In Precinct 1, the total votes cast was 161 votes. Obviously, one of those has got

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* * * (p. 391)

correct that in that case, you didn't know and you assumed that the Anglo was not the candidate of the Hispanics?

A. I'm sorry. Would you go back to the question again and repeat it?

Q. The basic question: When you considered those win rates, how did you know that the Anglo who was running was not the candidate of the majority of the Hispanics?

A. In the win rates that are presented in exhibits –

Q. I believe 10 through 13.

A. Yes, 10 through 13. I did not know who the preferred candidate was. I simply looked at how Hispanic candidates faired compared to non Hispanic candidates; and I did make an assumption there that Hispanic voters would probably prefer Hispanic candidates; that is, that they would consider Hispanic candidates as representing their interests. It may not have always been a true assumption, but it was the only information that I had to be able to compare how Hispanic voters were – whether they were frustrated in their attempts to elect candidates of their choice.

Q. Do you remember a Democratic party primary race between Ulie Sanchez and Mr. John – Juan Gomez?

A. Yes, I remember that mentioned in the testimony.

Q. You didn't analyze that case?

A. Let's see. What year was that?

Q. 1976, I believe.

* * * (p. 395)

A. No, if it was truly polarized, generally we find in

races that are truly polarized along ethnic lines that there is a higher turnout.

Q. You may have said the same thing I did in another way. I asked you to assume that the voting was approximately the same year after year among Hispanics. There are approximately how many registered Hispanics in Saguache County? Is it 900-some?

A. The number of registered Hispanics in 1984 was 400 – let's see – 2,482 voters that year. 36.5 percent of them were Hispanic. 906 were Hispanic.

Q. And that number doesn't change too much from election to election, does it: a few points, a few registrations up or down?

A. The number registered? I don't think it changed much over the years. I can't –

Q. Now –

A. – recall exactly.

Q. Back to my original question: I want to use as an example. Suppose of those 906 registered Hispanics, 850 of them vote every two years in the general election, '82, '84, '86, whether there is a Hispanic candidate, Anglo candidate, or whatever. What would that indicate if the number of registered Hispanics that vote stays constant?

A. It would indicate that the turnout rate was about the same for the various elections.

(p. 396)

Q. And that had – turnout rate had nothing to do with the race of any candidate. Isn't that correct?

A. It would tend to be then not related to the race of the candidate.

Q. And doesn't that provide some indication that the voting is not racially polarized?

A. Well, I would look for other data to indicate whether a race was racially polarized.

Q. We're all going to look for other data; but with that data, doesn't that piece of information weigh on the scale on the side of no – there is no racially polarized voting?

A. I would say that if I had no other evidence and I were given information about turnout rates and there was no change in turnout rates, some of the races involve Hispanic candidates and some of the years they didn't run, then I would say either – I probably wouldn't have enough evidence to conclude that there was or was not racially polarized voting. I'd want additional evidence. But I would – I would wonder whether or not the – during when the Hispanics ran – no, I actually – I cannot say that I would be able to conclude anything about polarized voting just from looking at that.

Q. I don't think anyone else would conclude anything from just looking at that. I'm talking about where that factor belongs. Does it belong on the yes side, there is polarized voting, or on the no side, there is not polarized voting?

* * * (p. 400)

from.

A. Okay. My general conclusion was to defeat candidates that are of the choice of the Hispanic community.

Q. But you were assuming that only those with Spanish last names were the choice of the Hispanic community. Isn't that what your assumptions were?

A. For purposes of this analysis in Plantiff's Exhibit No. 14, that's correct.

Q. Well, then, what about the candidates with an Anglo last name who were supported largely by Hispanics? Isn't that another way of saying that was the candidate of the Hispanics?

A. Yes, they would be; and if I had had that information prior to doing this analysis, I think I would have run it and indeed I have run that particular – in that case, on some of those races for McClure, and found that the same pattern came up about being their choice. They voted for him, being their candidate.

Q. How about the race for Charles Grant?

A. No, I did not treat that as the – again, Grant was treated as – for purposes of this analysis, you're talking about county treasurer's race?

Q. It's the wrong Grant. Charles Grant who ran for county commissioner.

A. No, I did not have any information that led me to believe that he was a candidate of their choice.

(p. 401)

Q. Okay. If you had known that he was the husband of the other Grant who ran for county treasurer, would that have made a difference?

A. Well, I'd have to have a little more information. The question is do Hispanics in the community, not who he's

married to – but whether Hispanics in the community see Mr. Grant as their candidate, a candidate of their choice.

Q. In every case where there was an Hispanic, you just assumed that that was a person running on behalf of the majority of the other Hispanics. Is that right?

A. For purposes of my analysis in Plantiff's Exhibit 14, I had to make a choice as to which races to run, to analyze, that might be a test of my hypothesis that there is racially polarized voting. And I, lacking any other information, I was – I used surname because that's the most commonly perceived outward identifier of a person's – what a person represents in terms of interests.

Q. Okay.

A. And I used that as my indicator to test my hypothesis, and I went through and analyzed those races where Hispanics were running against non Hispanics with the assumption that the Hispanics might be representing the interests of the Hispanic community.

Q. Did you analyze the race where Mr. Barela was a candidate for county sheriff?

* * * (p. 431)

reported by the Supreme Court in which they said what the trial court did was fine. Is that right?

A. I am.

Q. But you're not familiar with what the trial court actually did other than with respect to accepting the study of your friend, Dr. Groffman?

A. No, that's not correct. I am familiar with what Dr. Groffman did in his analysis, because I have discussed that analysis with him.

Q. But I understood from your testimony you weren't aware of the fact that there was another type of analysis presented by Dr. Theodore Erington which came to the same conclusions as Dr. Groffman. You didn't know that?

A. No, I'm not familiar with that analysis.

Q. You said that the other report you referred to even Dr. Groffman indicated that the candidate must be publicly known as a minority candidate or one who is for the minority party, whoever it may be in that case, "publicly known" being the major words. Is that right: publicly regarded?

A. There must be some sign for the public to identify whether that candidate is one that they can identify with or not, minority group can identify with.

Q. And once again, you didn't do that except by talking to the plaintiffs and by going by an Anglo name as opposed to an Hispanic name?

(p. 432)

A. That's correct. The only way in which when I began my analysis that I knew what might be the particular – whether a particular candidate had the backing of the racial minority was by looking at the ethnicity of the candidate.

MR. LUBOW: I have no further questions.

THE COURT: Any other questions on redirect?

MR. GARZA: No other questions, your Honor; but I would like to offer the Court the citation for the law journal article that Dr. Brischetto referred to. It's the Hastings Law Journal at Volume 34, and the particular item that he was referring to is at page 59 and 60.

THE COURT: All right. What's the date on that? Do you have a date?

MR. GARZA: September, 1982. And the title of the article is "From *Reynolds v. Simms* to *City of Mobile*, Have the White Suburbs Commandeered the Fifteenth Amendment?"

THE COURT: From –

MR. GARZA: "From *Reynolds v. Simms* to *City of Mobile v. Bolden* . . . "

THE COURT: If they have that upstairs in our library, I'll have my law clerk take a look at it.

MR. GARZA: Thank you, your Honor.

No other questions for this witness.

THE COURT: Did you want to excuse him, or did you want him to remain available?

* * * (p. 485)

pages of how the data was utilized, how it was analyzed, and what conclusions were reached.

Q. Would you describe where you got the data that you used in Exhibit A?

A. When I was approached some two years ago to do the analysis, Saguache County at that time provided relevant data, broken down by race and by party. We also

had the voting abstracts from 1970 to 1984, but data on voters registration by Democrat, Republican, unaffiliated, and data broken down by race, white, Hispanic, was only available at that time for the year 1984.

MR. CRITES: And would the clerk hand the witness Exhibit F, please. I believe Exhibit F has been admitted.

THE COURT: Yes.

BY MR. CRITES:

Q. Dr. Ellis, is Exhibit F the data that you're referring to which breaks down the voting –

A. It's part of the data. Exhibit F was prepared by the county and indicate the voter breakdown between registered whites and registered Hispanic and also the number that actually voted in the '84 general elections, again broken down by race and by precinct.

Q. The voter abstracts that you referred to – are those the same voter abstracts that have been admitted by plaintiffs,

Exhibits 34 and 35?

A. I have not seen those Plantiff's Exhibits. Are those the (p. 486)
same abstracts that were supplied to me?

Q. I'll show you in just a second.

MR. CRITES: Would you hand him the Plantiff's Exhibits 34 and 35?

THE WITNESS: That is correct.

BY MR. CRITES:

Q. Those are the data that you used to make your analyses?

A. Yes. It lists all the races, the actual voting by precinct, and the outcome of each election, whether they are local elections or national elections.

Q. Are those two exhibits the data you that you used to compile your report?

A. That is correct. The actual vote count for each of the candidates was selected from this abstract.

Q. Okay. You have been qualified as a statistician. Recognizing the potential for showing things by statistics that may not seem apparent, may or may not even be true, do you utilize statistical techniques to guard against the potential for showing the validity of obviously untrue inferences or assumptions? Would you relate some of those?

A. One of the limitations that I noticed from the start and analyzed in voting patterns in Saguache County, although we have a fairly large number of voters, some 2,600 registered voters, this data is broken down, allocated among nine precincts. Now, that's a fairly small sample. You have to be (p. 487)
very careful in statistics in working with small samples.

In this case, I attempted to utilize techniques that would minimize the sensitivity of the results to small changes in the input data. If you're dealing with a sample of nine and you modify the data arbitrarily or in some manner, there is going to be substantial change in the quotations estimated in the results that you're going to

obtain. So in this particular case, I was very careful in handling the small sample.

The statistics textbooks are full of warnings that statisticians can prove anything with a small sample. We hear that four out of five doctors recommend, etc., etc., etc.. You may get four out of five doctors to agree on something, but an it's a lot more difficult to get 40 out of 50 or 400 out of 500 to obtain the same result. So in this case, the techniques that were utilized were intended from the beginning to minimize the distortion that can creep into the analysis due to the small sample.

Q. And using the techniques that you described, using the statistical experience background and knowledge that you have, and using the data that has been admitted into evidence, did you compile a report to be submitted to the Court to discuss your findings?

A. Yes, I have.

Q. Is that Exhibit A?

A. That's Exhibit A.

(p. 488)

MR. CRITES: We would ask that Exhibit A be presented to the Court and used by the Court to follow the testimony of Dr. Ellis.

THE COURT: Okay. Are you offering Exhibit A?

MR. CRITES: Let me offer it now as an exhibit, and then we'll go back and analyze the report further.

THE COURT: Do you have any objection?

MR. GARZA: No objections, your Honor.

THE COURT: Exhibit A is admitted.

BY MR. CRITES:

Q. Dr. Ellis, I think you indicated that you were asked to analyze the data with respect to whether there was an indication of polarization in the voting of Hispanics in Saguache County. After you received the data, was there any other obvious correlation which demanded to be analyzed in order to adequately analyze the data?

A. Well, I was asked to do an analysis of voting patterns. I'm not familiar with Saguache County politics. The data that I see in the candidates are just names to me. I did not want to perform a one-dimensional analysis, do just one correlation and try to draw a conclusion on the basis of that analysis.

I performed a variety of analysis – analyses. I looked at the data from a variety of viewpoints, then selected those variables which I found to be most statistically significant and the ones that were consistently able to explain (p. 489)
the voting patterns of Saguache County.

Q. What are the various factors which you feel are statistically able to explain the voting patterns?

A. After analyzing the data, some 15 different political contests in Saguache County, I performed six different analyses on each of those political contests, a total of 90 different analyses. And I looked at the various relationships and determined which of those were statistically

significant and which were found to be highly statistically significant, that were able to consistently and accurately predict or explain voting patterns in Saguache County.

Q. Would you explain why you – of all the political races that were involved in Saguache County, you selected the ones that you selected?

A. Well, the specific complaint in this case involved the office of county commissioner. And I thought it was very important to analyze as many of those cases as possible. I analyzed all cases for the office of county commissioner from 1978 to 1986. I even went back one year and picked up a race from the year 1976, although that analysis used an entirely different data base, pre 1978. There was only six or seven precincts in Saguache County.

THE COURT: I'm sorry. How many precincts?

THE WITNESS: Seven as opposed to the current nine. I had some data on registered voters and ethnic breakdown breakdown of the (p. 490) voters for the year 1972. The only data I had which showed the voter breakdown by precinct in each of the seven precincts, and that election result I analyzed for '76 involved an Hispanic candidate; so a total of 8 out of the elections analyzed – 8 out of 15 involved the office of the county commissioner. But 3 out of those 8 involved an Hispanic candidate.

I wanted to have more evidence to have a more balanced sample, to be able to observe voting behavior under various circumstances or conditions.

Q. Under what circumstances did you use registered voters as opposed to actual vote count?

A. In all cases, I've utilized registered voters, the reason being we're dealing here with a small sample; and I wanted the voted count in each of those precincts to be as maximum as possible, to provide some stability and some consistency in the analysis and interpretation of the results.

Q. Why did you not select any primary elections for analysis?

A. Well, the voter turnout in primary elections is some cases – some 30 percent, and that vote is split among many candidates, makes it extremely difficult to derive some stable relationships. The results are too volatile when you're using small vote count. So all the elections I analyzed involved general elections. Bigger voter turnout, a larger, stabler data base, talking about the registered voters. So I shied away from altering the basic data – the data basis that was (p. 491)
utilized in all the cases. I did not want to use the actual vote count, because in many cases that did not include the absentee vote because of – don't have a hundred percent voter turnout. You're dealing with the smaller sample, which is prone to larger errors.

Q. Okay. In making your analysis of who won and who lost and the significance of that, you did use actual vote count in each of the abstract reports?

A. When you're doing bivariate analysis, you have two variables. I'm referring here to the explanatory variable or the independent variable, what was used as the basis

of predicting the actual vote count for a particular candidate in Saguache County by precinct.

Q. And on – between page 5 and page 6 of your report, do you – did you construct a table of the names of the candidates?

A. That is correct.

Q. Of all the races that you analyzed?

A. There is a table of all the races that have been analyzed. As I said previously, a total of 15. Eight of them concern the office of county commissioner. Several others are for the – for local county office, and some are for state office. Seven of them involve the Hispanic candidates. The other eight involved either Republican against a white Democrat or a white Democrat against an Independent Hispanic.

Q. Then I'll refer you to the tables at the end of Exhibit A (p. 492) and ask you to go through those tables beginning with Exhibit A, which – Exhibit A to Exhibit A, which is the first table at the end of the report and ask you to describe briefly what that is. I think it's fairly self-explanatory, but –

A. You're talking about Exhibit Triple A?

Q. No, single A. It's titled, "Registered Voters by Party."

A. Well, you're referring to the graphic exhibits.

Q. Yes, the graphic exhibits.

A. The data was utilized to make the analysis. It's noted in Exhibits A through F. Exhibit A indicates the registered

voters by party. Now, this data is voter breakdown by political affiliation was provided by the Colorado Department of State; and it was included along with the voter breakdown by race to form the basic data base.

Q. And Exhibit B?

A. Exhibit B indicates the registered voters by race, white vs. Hispanics. It shows the vote count by precinct on the basis of race.

Q. And Exhibit C?

A. Exhibit C compares the registered Democrats vs. the registered Hispanics. It shows the distribution again of the count by precinct.

Q. Okay. Now, you're using the term "versus," which has a particular and perhaps peculiar meaning to lawyers, which may not be exactly the same meaning that you have in mind for your (p. 493)
analysis. Would you describe –

A. I'm using the term in a totally benign fashion. As a statistician, when we perform correlation analysis, you're correlating Variable X vs. Variable Y; so throughout, when you see the word "versus," does not imply anything derogatory. it says in a sense that we're correlating or performing a regression analysis of this variable against that variable.

Q. Or compared to, rather than against. Against also has a connotation –

A. Right.

Q. Okay. Would you go on to Exhibit D?

A. Exhibit D indicates the registered white voters by precinct.

Q. Exhibit E?

A. Indicates the registered Hispanic voters by precincts.

Q. Is there anything significant about the exhibit which that exhibit indicates about the data that you used?

A. The most troublsome of the data that was available was the number of registered Hispanic voters. We're dealing with a small sample, nine precincts. Looking at the distribution here of the Hispanic voters, four out of the nine precincts contain only 23 voters out of some 960 total registered Hispanic voters.

Q. Does that present a problem in statistical analysis?

A. Definitely, yes. It skews our sample here very, seriously because the allocation of voters by number, by precinct here, is severely skewed. As I said, Precincts 2, 3, 4, and 9 (p. 494)
contain a mere 23 registered Hispanic voters; and 1, 5, 6, 7, and 8 contain 97 percent.

THE COURT: Can I just interrupt, because I need to make sure I understand something. If you flip back to the graph that is entitled, "Registered Democrats vs. Hispanic –" it's Exhibit C. Dr. Ellis, for example, in Precinct 6, you've got 284 Hispanics and only 240 Democrats.

THE WITNESS: Yes, your Honor. This chart here has a special purpose. Later on, I'm intending to indicate that these two variables, registered Hispanics and registered Democrats, move in tandem. They're very closely related. And as previous testimony indicated, three out of

four Hispanics are registered Democrats, 75 percent. In fact, Hispanics make up 57 percent of the Democratic party. A small percent, 5 to 6 percent, some 67 registered Hispanics, are registered as Republicans, and the remaining portion, some 22 percent, some 188 voters, are registered as unaffiliated or independent.

THE COURT: But some of those registered Democrats that you have in this exhibit are non Hispanic.

THE WITNESS: Oh, definitely. We said 57 percent of the Democrats are Hispanic. The rest are non Hispanic or white.

(p. 495)

THE COURT: So all you're trying to do in this chart is show that there is some –

THE WITNESS: I intend to show later, your Honor, that the correlation between those two variables, registered Hispanics and registered Democrats, is extremely high. As a matter of fact, it's over 90 percent. They're essentially the same variable. You find this high correlation. I'm making the point that registered Hispanic voters in Saguache County are very closely identified with the Republican party – I mean with the Democratic party; and my analysis shows that the they vote primarily Democratic.

THE COURT: Again, let me just stay with this one moment so I understand it. For example, look at the precinct 7 as an example, 174 registered Democrats and 172 Hispanics. Is that –

THE WITNESS: That is correct, your Honor.

THE COURT: That 174 registered Democrats could be half Anglos and half Hispanics?

THE WITNESS: That's correct. This chart doesn't indicate anything of this nature here, but there is some 1,270 registered Democrats, 965 registered Hispanics. The difference would be obviously non Hispanic.

THE COURT: Go ahead.

BY MR. CRITES:

Q. Referring to Exhibit E, would you take a look at the number

* * * (p. 526)

THE COURT: Okay.

BY MR. CRITES:

Q. Yes. If you do need the exhibit to look at, let me know and we'll get it for you.

I believe you mentioned that you had calculated the – I think it's using Exhibit 3, the Plantiff's Exhibit 3 or 4, that the percentage of the Democratic party represented by Hispanics is 57 percent. Is that correct?

A. That's correct.

Q. Also, I believe in that table there is a tabulation of the number of Democratic registered voters and the number of Republican registered voters and the number of independent registered voters?

A. That's correct.

Q. Does the table indicate that the Democratic party is numerically the largest?

A. 45 percent of all registered voters in the – in my data base, something I assume similar to Exhibit 3 of the plaintiffs.

Q. And it wins – you said 25 percent?

A. 45.

Q. I'm talking about win rates now. The Democratic party wins something like – you said on the commissioner races, they win about 25 percent of the time?

A. 25 percent; and out of the 15 races I analyzed, they won some – close to 30 percent, about a third of them.

(p. 527)

Q. Given that data, is it statistically indicative that the Hispanics as Democrats have less opportunity to elect candidates of their choice under the present system of election than they would have if they would 56 percent of this single district?

A. Well, some of the most recent cases I analyzed, specifically the 1982 race, Abeyta vs. Hall – that was decided by some 53 votes; and then the one last year, Mr. Archuleta lost by some 22 votes – had in that – in those particular two cases, in one case had 26 voters shifted from one side to the other, the result would have been reversed. In the second case, had some 12 voters shifted from one side to the other, the margin there or loss was so slim. So in this particular case, what accounts for the loss of a candidate when the margin is so close by 22 votes –

Q. As a statistician, could you predict that, who would win or who would lose on those two races?

A. Not that close.

THE COURT: I'm sorry. Could he predict what?

MR. CRITES: Who would have won the race?

THE COURT: If what had happened?

MR. CRITES: In predicting the outcome of the election.

THE COURT: Okay. I thought you were still talking about the 56 percent district.

MR. CRITES: No.

(p. 528)

THE WITNESS: Well, what he was referring to, your Honor, at the present time, Hispanics make up 57 percent of the Democratic party. He was saying, well, if – have a better chance if they were a district with 57 percent of vote, would they have done better as opposed to what they've done in this particular case?

I have no way of determining that statistically. You just can't predict with such high degree of accuracy. The models I've used here, I can get as close as plus or minus 2 ½ percent of the vote, plus or minus 50 votes. I can't get it down to 22 votes.

BY MR. CRITES:

Q. Okay. as to the analysis that you have made statistically, do you find that the Hispanics vote as a bloc more strongly by race or by political party?

A. Well, the main issue in this particular case is whether the election results are racially polarized – whether the elections themselves and whether voting is polarized along racial lines.

Obviously, the first thing a statistician has to do to show that Hispanics vote as a bloc – and I believe both the plaintiffs' and my study indicates that Hispanics vote as a group in favor of Hispanic candidates. This is no big surprise. As a matter of fact, it's a mathematical necessity. Democratic candidates – excuse me – Hispanic candidates run as Democratic candidates. Hispanics make up the majority of the Democratic (p. 529)
party. So voting takes place along political lines. Since we find a high correlation between the Democrats and the votes received by the Hispanic candidate, we should find a high correlation between the votes received by the Hispanic candidate and the Hispanics. Now, this is a necessary but not sufficient condition to prove or disprove statistically voter polarization. But it does indicate that they vote as a bloc.

Now, the other question that begs to be asked: If the Hispanic voters vote as a bloc in favor of Hispanic candidates, what is their voting behavior when no Hispanic candidate is running?

Q. You analyzed several races in which only Anglos were running?

A. That's correct.

Q. Why did you do that?

A. We had to use a control group

Q. What do you mean by "control"?

A. All the cases were analyzed by the plaintiff – they involved races with the minority candidate, 10 of them. In this particular case, I wanted to observe the behavior of the Hispanic voters when both candidates running

were white and when one of the candidates running was Hispanic.

We established in this particular case that yes, there is statistically significant correlation between registered Hispanics and the votes Hispanic candidates receive. How do (p. 530)
the Hispanics behave at the polls, at the voting booths when both candidates are white? And I found that they vote Democratic regardless what the race of the Democratic candidate is. In other words, they find white candidates running on the Democratic party to be the candidates of their choice, and they support them just as strongly.

And some of the correlation coefficients I found are just as high when you compare Hispanics vs. the Hispanic candidate and when you compare Hispanics vs. the white candidate. So in the analysis here, we find that party affiliation, rather than race, is the primary consideration. And it's very difficult here to separate the two, because the Hispanic minority is closely associated with the Democratic party.

We said yesterday that three or four out of the Hispanic voters are registered Democrats. In fact, they make up 57 percent of the Democratic party. So when they vote for a Hispanic candidate, they're voting because they're Hispanics or they're voting because they're Democrats.

I have no way of separating that effect, but I found that they find white candidates to be the candidates of their choice when they run as Democrats.

Q. As a statistician, in your analysis of the races that you – that are available, if you analyzed only the races that involved an Hispanic, would your statistical analysis be (p. 531)
complete enough to rely upon for any purpose?

A. Well, if the voting behavior of the Hispanic minority was racially motivated, they should vote as a bloc –

Q. You're not answering my question. My question is on the subject of your control – you said you wanted a control.

A. Yes. I understand the question.

Q. Okay. Now, can you statistically analyze this kind of data without using a control and have your – have that be acceptable in the statistical analysis community?

A. Well, as I said earlier, I wanted to observe the behavior under both conditions; and that's the importance of the control group. We know Hispanics vote as a bloc when the Hispanic candidate is running. We discover that they vote as a bloc when a white candidate is running; so in this particular indication, we find no significant change in the voting behavior of the Hispanics when the ethnicity of the candidates changes.

Q. But would you have been able to tell that if you had done the kind of analysis that Dr. Brischetto did using only Hispanics? Would you have been able to tell what you just said?

A. In statistics, always we have to have two groups, the control group and the experimental group. In medical science, you do the same thing. You're testing the effectiveness of a drug. You give the actual drug to one group,

you give a placebo to the other group and compare the differences.

(p. 532)

In this particular case, I found that Hispanics vote Democratic regardless of the race of the candidate.

Q. Okay.

A. Had not that been the case, had I found that they changed or altered their voting behavior, they stay home or they reduce their voter turnout rates or do not vote for white candidates, that would indicate that the candidate was not the candidate of their choice.

Q. You answered my next question, which is whether the Hispanic community is a cohesive or like-minded group.

I'm going through the *Thornburg* checklist, so you're going to need to answer the questions as I put them to you here. The political cohesiveness of the Hispanic community.

I think you have described, but would you describe it in terms of political cohesiveness, because you've said they are politically cohesive; but are they politically cohesive because they're Democrats, or are they politically cohesive because they're Hispanics?

A Well, the majority – you're looking at two variables here that – you're talking about the Democratic party, some 1,207 registered voters, and 57 percent of them are Hispanic. They're so closely intertwined. I found them to vote primarily along party lines. They vote as Democrats.

As part of my analysis, I attempted to determine whether they ever cross over and vote for Republicans.

(p. 533)

Q. Yes.

A. In no case, I found such correlation; so –

Q. Hispanics don't vote for Republicans too much?

A. Democrats don't for Republicans, and vice versa.

Q. Republicans don't vote for Democrats?

A. That's correct.

Q. You're answering any next question already, which is does the data indicate that the white majority vote sufficiently as a bloc to usually defeat the Hispanic choice of its candidate?

A. Three points, three conditions I was looking for to determine whether voting was strongly affected by race. The first one we discussed, do Hispanics vote as a bloc, only for Hispanic candidates. The answer was no, they also vote for white candidates.

The second question, the more crucial question in this particular case: What is the behavior of the white majority, the white registered voters that make up 64 percent of the voters in Saguache County? It was essential in this particular case to observe their behavior under both conditions: How did they vote when the Hispanic candidate was running and how did they vote when both candidates that were running were white?

Now, in all cases analyzed, all 15 of them, we found a significant white crossover vote; and that has to be there

if a Democrat or Hispanic are to win any races. Democratic party controls 45 percent of the vote. Hispanics as a group control (p. 534)
36 percent of the vote. If they vote as group to make up the difference between those numbers and what is actually needed to go over 50 percent, there has to be a statistically significant crossover vote and large enough to – and turnout in the case Mr. Allen, in the case of Mr. Grant. That was indeed the case. It put them over the 50 percent mark, and it came awfully close to putting Mr. Archuleta last year – just loss by 22 votes.

The analysis I found, the behavior of whites, there is a statistically significant crossover vote when both candidates are white.

THE COURT: I think you need to define what you mean by "crossover," because when they're both white, you're talking about a crossover from independent to Democrat.

THE WITNESS: From Republican to Democrat, could be from independent to Democrat, could be from white Democratic, analyzing the race – the election results on the basis of race, your Honor.

THE COURT: But when you're talking about two whites running, what you're doing when you're talking about crossover –

THE WITNESS: I was talking about the crossover in favor of the white run under the Democratic party for the Democratic candidate; and I wanted to see what happens when the Democratic candidate is Hispanic. Do whites alter their voting behavior? Do they withhold their vote,

or do they shift their vote to defeat or to frustrate the attempts by the Hispanic (p. 535)
minority to elect a candidate of their own race? I found no such behavior, your Honor. In all of the cases analyzed, there is significant white crossover vote in favor of Hispanic candidates. In the last two elections, it came awfully close to putting those candidates on in the win column.

BY MR. CRITES:

Q. If you are using the term "statistically significant," is 22 votes out of 2,000 votes statistically significant?

A. I believe not.

Q. Is 53 votes out of some 2,000 votes statistically significant?

A. Again, it would depend on the particular race and the – when we say, "statistically significant," we're trying to predict a variable here, and we're using various explanatory independent variables. Should we include those in the predictive equation, regression analysis? Statistical significance, once you reach a critical point, becomes statistically significant, like you say an r square of 67 percent is statistically, significant. But you can't prove anything with that. It's still very, very low. What you have to look at are the – is there a wide crossover vote that's large enough in absolute terms, in number of votes, to push a candidate over the – the win column.

THE COURT: Let me try this just oversimplified: If the Democrats are 45 percent and a Democratic voter (sic) wins – (p. 536)

and in this case, only two have won, Grant and who is the other one – Allen –

THE WITNESS: That's correct.

THE COURT: – and Grant won by 51 percent, then can't you sort of just assume that he received 45 percent of the vote from Democrats, or close to that, and the balance from independents?

THE WITNESS: Well, part of the Democrats, your Honor, 57 percent are Hispanic and the other 43 percent are white. When I'm talking about the white crossover vote, here I'm analyzing the case on the basis of race. After they got the Hispanic vote –

THE COURT: I'm talking about Grant, who is white.

THE WITNESS: True. 37 percent of the Democrats are white. i'm saying that the whites as a race, not the whites as part of the Democratic party, when we're talking about the 64 percent of the vote which is registered whites vs. the 36 percent which are registered Hispanics and we're analyzing the race – the particular election along racial lines, we're saying after they get the vote from the Hispanics, do enough white Democrats, do enough Republican whites, do enough independent whites cross over to vote in favor of the Hispanic candidate, who usually runs under the Democratic party.

THE COURT: I thought you were telling me, though, that the statistics are more significant, the relationships, to (p. 537)
show that the Democrats vote for Democrats; and I'm accepting that: that the Democrats vote for Democrats.

THE WITNESS: That's correct. I want to look at the whites as a group, take the 64 percent of them and see if that variable, taken along with the Hispanics, can do a better job of predicting the votes an Hispanic candidate gets if you look at Hispanics alone. That was the objective: that white crossover votes – do whites in significant numbers vote for Hispanics, because if we had extreme polarization, only Hispanics vote for Hispanics, then the vote would be 64 percent to 36 percent, your Honor.

I'm saying in this particular case, if an Hispanic candidate gets 49 percent, the difference between the 36 percent and the 49 is the white crossover vote.

THE COURT: What effect would it have, since you're talking about registered voters – what effect does it have that in a certain election, maybe all of the registered voters who are Hispanic vote but not all of the registered voters who are not Hispanic vote?

THE WITNESS: Come again with that, your Honor.

THE COURT: You're talking about registered voters.

THE WITNESS: That's correct.

THE COURT: And there may be a difference as to how many of the registered voters actually vote.

THE WITNESS: That's correct.

(p. 538)

THE COURT: So can't the difference be explained on the basis that if an Hispanic runs, it might encourage all of the Hispanic registered voters to actually go to the polling plays and vote? We've heard testimony that they

actually get out the vote, but not all of the registered voters who are not Hispanic vote. How do you account for that?

THE WITNESS: The voter turnout rates, your Honor, in the data I looked at, 1984, we had the voter turnout rate of over 80 percent: 83 percent for the whites, 81 percent for the Hispanics.

I believe the plaintiffs – they had voter turnout rates for Hispanics for '82, '84, and '86. In 1984, there was no Hispanic candidate running; but the voter turnout rate was the same in '84 as it was in '82 as it was in '86 for the – that is, the percent of the total vote they were controlling was still 36 percent of the total, so they turned out at the same rate as the whites.

THE COURT: Is there any difference in the turnout rates between the Hispanics and whites when there is an Hispanic running as opposed to when there is two whites?

THE WITNESS: That's what I just said. In 1984, there were no Hispanic candidates. Hispanics –

THE COURT: And both the turnout rates were the same as they were before.

THE WITNESS: That's correct, after the correction we (p. 539)
made yesterday. The data the for 1984 did not include absentee votes. '82 and '86, they did, but I believe that was –

MR. GARZA: Your Honor, I'm afraid I'm going to have to object to that particular aspect of the testimony. There was no correction to that particular exhibit.

THE COURT: What exhibit is it?

MR. CRITES: Exhibit 3, I believe.

MR. GARZA: Exhibit 3.

MR. LUBOW: Exhibit 4.

MR. GARZA: Exhibit 3.

THE COURT: I don't think 4 was ever admitted, was it?

MR. GARZA: Yes, I believe it was, your Honor, by stipulation.

THE COURT: Let's see.

BY MR. CRITES:

Q. Did you analyze Exhibit 4 on the – of the plaintiffs regarding the three years in which the Hispanic turnout was tabulated?

A. Yes, and I noticed the –

Q. And what did your – what did – what data did you examine in order to check the figures on the Plantiff's Exhibit 4?

A. Well, I have the data for 1984, and I knew the voter turnout rates and what they were. The plaintiffs had shown that there had been a drop in voter participation by Hispanics in the '84 race.

(p. 540)

Q. Yes.

THE COURT: Now that Charlotte is here, because I'm having problems finding my exhibit list, do you show exhibit 4 as being admitted, Charlotte?

THE COURTROOM DEPUTY: 4, no.

THE COURT: Pardon?

THE COURTROOM DEPUTY: No.

THE COURT: I don't think 4 was ever offered.

MR. CRITES: We don't have to discuss it, if it's not in evidence.

THE COURT: It's my memory that it was not. It was never offered and never admitted.

MR. CRITES: If it is, we may want to put on some more evidence; but since Exhibit 4 was never put on in evidence, we'll leave it alone.

THE WITNESS: Your Honor, I cannot answer your question. That was the only information I had seen. My data base concerns the year 1984, and I found the year 1984, 36 percent of those that voted were Hispanic. If we have any other data for any other years, we can make a determination; but for '84, the breakdown was 36 percent to 64 percent.

THE COURT: Are there any exhibits that show the turnouts in the various years? Is that part of any of the exhibits? I can't recall.

MR. CRITES: I guess the only evidence we have at this (p. 541)
point is by race; and since we feel that Exhibit 4 is in error we're not willing to offer it to the Court.

MR. GARZA: Your Honor, if I may, my records indicate that plantiff's Exhibit No. 5 was offered and admitted. I may be wrong; but if I'm correct, then that particular exhibit does have turnout rates.

MR. CRITES: Look at 5.

THE COURT: Okay. Let's look at 5, because I think I agree: I think 5 was admitted. 5 is admitted.

MR. CRITES: Would you hand Dr. Brischetto (sic) Exhibit 5.

THE COURT: Wait a minute. Doesn't – doesn't Dr. Ellis actually have a breakdown on his exhibit?

MR. CRITES: Exhibit F shows –

THE COURT: On Exhibit F?

MR. CRITES: Shows the 1984 today.

THE WITNESS: Exhibit Data 2, your Honor – that shows the actual count of voters and the turnout and the —

THE COURT: Okay. I guess my only question to Dr. Ellis was whether his figures take into account the actual turnout as opposed to the registered voters and is there a difference, depending on whether two Anglos run or an Hispanic and Anglo.

MR. CRITES: Has he answered that to your satisfaction?

THE COURT: And you're saying there is no difference.

* * *

(p. 543)

THE WITNESS: Yes. The only other data that I have seen indicate in the comparative voter turnout rates for the year 1982 and '84 and '86 is Plantiff's Exhibit 5, your Honor.

BY MR. CRITES:

Q. Why don't we stick with your exhibits. Do you have any other data?

A. No, I do not.

Q. That is the only data to indicate whether the percentage of turnout is the same as the percentage of registration?

A. Well, if you look at Data 1, which is the 1972 data base with the 7 precincts, your Honor, the registered voter breakdown is essentially the same, roughly the same there: 38 percent Hispanic, 62 percent white; and that corresponds fairly closely to the '84 data base.

Q. This is voter turnout you're talking about in both cases?

A. For 1972, actually, just the people registered to vote. We don't know how many showed up. We don't know the actual vote count.

Q. So the actual voter turnout as compared with the actual voter registration – that's her question. Is the only exhibit you have, then, Data 2?

A. That's correct. This is the data we used throughout for this Data 2, which was provided by the county.

Q. And the correlation between the turnout and the registration, the percentage of Hispanics who are registered (p. 544)
voters and the percentage of Hispanics who turned out to vote, how do those corrleate?

A. Very, very closely together.

THE COURT: Can you look at Data 2 and explain something to me on your percent line, where you have the number voting?

THE WITNESS: Yes.

THE COURT: It says 71 percent white – is that correct – and 29 percent Hispanic?

THE WITNESS: Yeah. Those voting at the polls, your Honor, does not include the absentee vote; and farther down I amend the absentee vote. Turns out one-third of the Hispanics vote absentee. That's a pretty high rate. And 10 percent of the whites vote absentee. When you include the total, it comes out to 64 percent vs. 36 percent.

THE COURT: Oh, I see where you got that.

THE WITNESS: And plantiff's Exhibit No. 5 –

MR. CRITES: Do not use Exhibit 5. Thank you.

THE COURT: Well, let's use 5.

MR. CRITES: All right.

THE COURT: Are the figures close to the figures on 5.

THE WITNESS: The data they have for '84, your Honor, apparently is the number voting at the polls, does

not include the absentee vote, because otherwise the voter count is too low. When I include the absentee vote in there, the turnout was the (p. 545)
same for '82 and for '86.

THE COURT: Well, you had indicated in your opinion that when two non Hispanics are running that Hispanics did not stay home; they went out and voted in the same numbers.

THE WITNESS: That' correct.

THE COURT: Does this verify what you said?

THE WITNESS: That's correct, your Honor, because I found no evidence of that, because the correlations and the analysis I preformed show that they're just as strong when the Hispanic candidate is not running; that the Hispanics vote straight Democratic, regardless of the ethnicity of the candidate.

THE COURT: Okay. Thank you.

Go ahead with your questions.

BY MR. CRITES:

Q. With the exception that you just noted, do your data and conclusion of the predictability of Hispanic, as you say, vs. Hispanic candidates agree with the data and predictability that was found by the plaintiff?

A. I reviewed the current statistical analysis by my colleague, Dr. Brischetto.

Q. As a general rule, with an exception we'll go into in just a moment, does your data agree on the predictability of Hispanic voters with Dr. Brischetto?

A. Some of the cases Dr. Brischetto analyzed were the same (p. 546)
ones I did, utilized essentially the same techniques except to transform the data into percentages; and some of the correlation coefficients and the r squares were the same I arrived at, with the one notable exception.

Q. Okay. Let's get into the exception now. What is the major exception to that?

A. His analysis he did about the election of '86 for Mr. Archuleta vs. Mr. Freel –

Q. Okay, now. Let me find that before you proceed with it. I believe you're discussing your Exhibit HH with the Exhibit 14 of the plaintiff, which had several pages. So we'll need to find –

A. I believe it's page 3 that contains the scatter plot and the graph itself.

Q. Okay. Page 3 of Exhibit 14? Is that the one you're talking about?

A. On top it says 1986 general election for county commissioner, District 3, Saguache County, dated 11-9-87.

Q. On the left-hand side of that exhibit, it says, "Votes for Archuleta." Is that the one?

A. That's correct.

Q. And then on the bottom, it says, "Proportion Spanish Surname of Votes"?

A. That's correct.

Q. Would you explain the difference between your analysis of (p. 547)
that particular race and the analysis by Dr. Brischetto?

A. Dr. Brischetto is using a slightly different predictive variable. Apparently he did not have the number of registered Hispanic voters, so he used the – the number that actually voted.

Q. Okay.

A. And furthermore, he converted a raw data into percentages in the given precinct; so what he's predicting is the percent of vote received in each precinct in favor of Mr. Archuleta vs. the proportion of total number of voters that were Hispanic.This is the only case in those areas where we analyzed the same cases that there are substantial differences in his conclusions and the conclusions I reached regarding this particular race.

Q. Would you explain from your statistical background the methods that were used to form this exhibit and the – the percentage of error predicted by Dr. Brischetto in this exhibit as to how that would relate to perhaps the reason for the difference.

A. Dr. Brischetto performed, utilized the same statistical techniques, regression correlation analysis. The major change and major difference between his approach and mine, he converted the actual data, the raw vote count in each precinct, into percentages before he performed the analysis.

Q. From a statistical point of view, from the point of view of a statistical analyst, is that good procedure?

A. That would depend on the situation. This is a special case (p. 548)
here.

Q. Why?

A. As long as we're using the number of Spanish registered voters – we got nine precincts. As we stated earlier, four out of the nine precincts contain only three percent of the Hispanic vote, actually 278 registered voters in Precincts 2, 3, 4 and 9. So this data base, number of Spanish surnamed voters, is skewed in this particular case. If we had a large sample size, maybe it wouldn't make a big difference how we derived it, whether we gave special treatment for this four precincts with the very little vote, if it were 4 out of 60 or 4 out of a hundred. But in this particular case, we're talking about almost half of the precincts; that the sample is so skewed now – that's not Dr. Brischetto's fault. This is the actual data we have to work with.

In this particular case, if you transform the data in a different form, as he has done, from votes into percentages, I believe it seriously biases the importance of these 4 precincts in the analysis. They only have 3 percent of the vote vs. the other five that have 97 percent; and he has done that before he entered the data on the analysis – he has performed some weighting after the analysis, but I have difficulty with the – in this particular case with the particular transformations he used. As a result, the accuracy of his prediction – predictions from this analysis contains a (p. 549)
large – very large margin of error.

Q. Can you tell that from looking at his work?

A. Yes. I –

Q. How do you do that?

A. I have done two analyses here side by side using his data. The equation he calculated attempting to predict the number of votes Mr. Archuleta got –

Q. Okay.

A. – plus or minus the error. And then I done the same using my equation, using registered Hispanics as the predictive variable.

If I may proceed to the easel to demonstrate the two differences –

Q. Hold on just a minute, Dr. Ellis. This may take a little time to put on the –

THE COURT: Why don't we take a recess and he can put it on during the recess.

MR. CRITES: Thank you, your Honor.

(The Court was in recess from 11:10 till 11:30 a.m., and when reconvened, the following proceedings were had and entered of record:)

THE COURT: Okay. Go ahead.

BY MR. CRITES:

Q. Dr. Ellis, we were discussing page 3 of Exhibit 14; and the question was did you find a significant error, what you (p. 550)
consider from a statistical point of view to be a significant error in the data on that page 3?

A. Both Dr. Brischetto and I developed regression equations. That's supposed to predict or explain the votes received by a particular candidate in Saguache County. This particular case, I'm comparing Dr. Brischetto's equation, which is based on the data after it has been converted into percentages, instead of correlating the number of votes received by Mr. Archuleta vs. the number of Spanish surnamed registered voters, or those that actually voted.

Q. And after you did that comparison, did you find an error?

A. The error is in the –

Q. So you did find one?

A. No. The error is in the predictability of the results. When we develop a regression equation, we want to be able to say, I predict that the votes received by such and such candidate are . . . I want to be 95 percent confident – some confidence level that it's going to be such and such, plus or minus a certain amount of error. And the error here was estimated in Dr. Brischetto's analysis.

Q. What was that error?

A. Very wide. The term "standard error of the estimate," which has to be used to determine the reliability of the forecast of the prediction we're making, the SE of estimate, Dr. Brischetto estimates from his estimate to be 7.3 percentage points, .07374. (p. 551)

Q. And that is found on page 3 where?

THE COURT: I see it, Counsel.

MR. CRITES: Okay.

THE WITNESS: Line next to the bottom. So what I have done – This is an analysis Dr. Brischetto prepared. We got the same correlation coefficients, the same coefficient determination, and we're attempting to predict the number of votes Mr. Archuleta received using both methods.

BY MR. CRITES:

Q. Okay. Now, have you drawn on the easel there your analysis of the two analyses?

A. That's correct. Down at the bottom, I'm indicating the regression equation I estimated in predicting the votes for Mr. Archuleta, where the explanatory variable used is the number of registered Democrats. So I have Y equals 1 – that's 1 vote plus –

MR. CRITES: Would it be all right for the witness to go to the easel to point out –

THE COURT: Sure. Go ahead. Step down.

THE WITNESS: Here's the equation I estimated in Exhibit HHH, your Honor, to predict the votes received by Archuleta on the basis of number of Democrats. I found the correlation coefficient of 92 percent and an r square of 85 percent; and this is the linear equation, the result of the regression analysis –

* * *